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This article was submitted initially as a research paper for my course, Canadian Government and Politics. I recommended its publication both because of its intrinsic merit and because it addresses matters of vital concern to Montanans. To conserve space, the footnotes and bibliography have been omitted.

Mr. Hoklin served as Legislative Assistant to Congressman Max Baucus prior to the time when this paper was drafted. His duties on the staff of the Congressman brought him into contact with the Cabin Creek controversy. Thus, he was able to bring to the preparation of this paper a perspective not normally possible in student research. The opinions expressed in the article are those of Mr. Hoklin. The Bureau takes no position other than to encourage the expression and dissemination of informed opinion on issues of public consequence.

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Cabin Creek Realities

by Lonn Hoklin

I

The North Fork of the Flathead River begins in the high country just south of the village of Fernie, British Columbia, and winds toward the U.S.-Canada boundary through an undeveloped valley walled on the American side by the majestic, heavily forested mountains of Glacier National Park. Five miles northeast of Columbia Falls, Montana, the North Fork joins the Middle Fork which rushes out of Montana's fabled Bob Marshall Wilderness, to flow thereafter into Flathead Lake, America's largest natural body of fresh water west of the Mississippi.

The entire Flathead River drainage is rich in wildlife and fish that depend on a delicate balance in the mountain ecosystem. A well developed recreation and tourism industry thrives on the Montana side. In recognition of the unique natural and economic values of the area, the 94th Congress enacted the Flathead Wild and Scenic Rivers Act which established a federal policy of maintaining the river in its natural, free-flowing state.

In 1968, Rio Algom Limited, a division of Britain's giant Rio Tinto Zinc, embarked on a joint venture with Pan Ocean Oil Limited of Calgary to conduct economic and engineering

studies for coal development in southeast British Columba. Known as Sage Creek Coal Limited, the combine initiated exploration on 24,652 acres of Crown Land (publicly owned) as authorized by fifty-one separate licenses issued by the government of British Columbia. Seven years of mapping, trenching, drilling and underground sampling at a cost of three million dollars resulted in Sage Creek's decision to begin a final feasibility assessment of a particularly rich site on two hills astride Cabin Creek, a tributary to Montana's scenic Flathead River.

The hills contain an estimated 60 million tons of high-quality metallurgical coal, worth approximately thirty dollars per ton, about seven times as valuable as coal produced in America's Northern Great Plains (due to higher BTU content). Removing the coal, reported Bill Schneider, editor of *Montana Outdoors*, requires virtual annihilation of the two hills since the seams lie on an angle well beneath the crests.

The initial flurry of American concern over the effects of proposed Cabin Creek mining followed Schneider's September, 1974, report in *Montana Outdoors*; central to the public's misgivings was the question of whether Montana's much loved Flathead Valley could be spared the disasters of down-stream pollution from chemical leaching and siltation — effects well known through past American experience in the coal fields of Kentucky and Appalachia.

The crescendo of public outcries and the urgings of Montana's congressional delegation compelled the U.S. State Department to notify the Canadian government of possible transboundary difficulties relating to proposed coal development at Cabin Creek. The federal governments traded diplomatic notes, and various Montana political leaders made exofficio contacts with Canadians at both the national and provincial levels. Montana's U.S. Representative Max Baucus flew to Toronto in April, 1975, to confer directly with Rio Algom officials over the exact nature of the company's intentions at Cabin Creek and to determine what steps might be taken to protect the Flathead drainage. Upon his return to Washington, Baucus issued a detailed report on the meeting and called upon the State Department to seek Canada's cooperation in referring the Cabin Creek matter to the International Joint Commission (IJC).

"While I was encouraged by the prospect of an environmental study and the willingness of the officials to answer my questions," Baucus stated in the report, "as many questions emerged as were answered."

Baucus and officials representing Montana's governor, the U.S. State Department, the national Canadian government and the province of British Columbia subsequently toured the Cabin Creek site and received briefings by Rio Algom officials. In October, 1975, however, the vexing questions underscored by the Baucus Report of six months earlier remained unanswered.

"Rio Algom Mines Limited has yet to guarantee with satisfactory specificity that chemical leaching from the excavations will not damage the transboundary flow to the detriment of health and property," Baucus wrote to Assistant Secretary of State Robert McCloskey on October 2, 1975. "Serious questions remain as to whether siltation can be prevented to a degree sufficient for adherence to the Boundary Waters Treaty, and whether Rio Algom and British Columbia are fully cognizant of the specific constraints governing such adherence."

His inspection of the Cabin Creek site and conversations with company officials, the congressman declared, indicated that Rio Algom had ignored certain environmental considerations, and gave reason to doubt that the company would voluntarily suspend its development plans in the face of evidence "demonstrating the imminence of serious damage to the Flathead's sensitive aquatic species." Moreover, Baucus charged, the government of British Columbia had not indicated "beyond rather vague assurances that such important factors as aquatic life are of significant concern in setting criteria for the disposition of mining lease applications."

The *assurances* sought by Baucus and others related to coal production licensing, a matter in which the province of British Columbia — not the Dominion — holds jurisdiction. Canadian responses to American questions on all fronts had consisted of general assurances that existing agreements would be honored, i.e., those prohibiting transboundary water pollution to the detriment of health or property on the other side of the boundary; virtually every communication from Canada emphasized that Rio Algom's activities to date had been entirely *preliminary* in nature, and that the company had yet to apply for coal production licensing. These facts prompted the State Department to resist recommendations for submitting the issue to the International Joint Commission, and to parry suggestions for immediated consultations with the Canadians.

Baucus' October 2 letter to McCloskey recommended immediate consultations between the Dominion, the province, the State Department and Montana, a matter Baucus continued to press through his staff and through personal contact with Secretary of State Henry Kissinger and other officials. On October 16, 1975, due primarily to Baucus' efforts, the State Department changed its mind and drafted a diplomatic note to the Canadian Embassy which it forwarded on October 20:

> The United States Government is of the view that the Rio Algom Mines project could seriously damage efforts to preserve the unique environmental value of Glacier National Park, the Flathead National Forest, and the Flathead River Basin and could cause injury to both public and private property in these areas . . .
>
> The Department of State therefore suggests that consultations be held with respect to this matter at the earliest possible date.

II

On January 11, 1909, American and British officials met in Washington, D.C., to sign the Boundary Waters Treaty, a list of formal provisions governing management of water issues along the 5,500-mile U.S.-Canada boundary (including the Alaska-Canada border). Article IV of the treaty provides that "waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." Article VII established an International Joint Commission (IJC) to assist the signatories in enforcement of the treaty. At this point, some examination of these two features is in order.

Article IV appears to many Americans to be a substantive agreement which advances a prima facie guaranty that all steps will be taken by both governments to prevent harmful

transboundary pollution — at least that's how Americans are temped to read it, succumbing as they to do a passion for explicitly written laws and regulations. In the United States a treaty delivers the force and effect of law, and is thus readily enforceable, but this is not necessarily the case in Canada.

While attending the 1976 session of the Canada-United States Interparliamentary Group (Jan. 29-Feb. 2, Key Biscayne, Fla.), a prominent Canadian Member of Parliament (MP), Senator George Clifford Van Roggen of British Columbia, remarked to an American delegate on the legal status of international treaties in Canada. Treaties, Van Roggen said, cannot be introduced or pleaded in Canadian courts; in some matters, he added, the Dominion can overrule provincial actions and policies, a statement that Americans who fear for the Flathead might find encouraging, particularly if they count on the Boundary Waters Treaty for the Flathead's salvation. Such "disallowances" by the Dominion, Van Roggen stressed on the other hand, rarely occur. Since an examination of this important side issue appears later, the immediate focus will continue to be on the standing of treaties in Canada: based on the inadmissability of treaties in Canadian courts, one could state that treaties have standing only as administrative instruments, and then only as they relate to *federal* actions and policies because of the rarity of disallowances.

Since Canadian courts intervene into governmental affairs only on the basis of administrative decisions — not on matters of policy — a near total lack of legal standing for treaties is implied. The Canadian system disallows judicial review even of *policies* relating to treaty enforcement, so the U.S. must rely on the good will of Canadian officials in matters of enforcement, not on Canadian courts or on legal standing. Fortunately for the U.S., Canadian good will has remained steadfast since the inception of the Boundary Waters Treaty.

The second feature of the treaty in need of some analysis is the International Joint Commission, a creation of Article VII. A quasi-judicial tribunal consisting of six commissioners (three Canadian and three American), the IJC carries out four distinct responsibilities — not as two delegations under instructions from their respective governments, but as a "single body."

One responsibility is to approve or deny "applications" for the use, obstruction or diversion of transboundary waters in order to ensure that all interests on both sides of the boundary are duly protected or indemnified. Another responsibility, perhaps the most critical to this study, is investigation of specific boundary water problems after receiving a "reference" from one or both governments. Article IX of the treaty enables either government to refer an issue to the IJC, but the traditional method has been bilateral with both governments consulting in advance on the "terms of reference," that is, the specific points and issues with which the Commission should concern itself. Following its investigation of the case within the parameters of the reference, the IJC reports the "facts and circumstances" to the two governments along with its recommendations. Thus prepared, the governments hold further consultations in order to forge a workable solution to the problem.

A third responsibility hinges to some extent on the second. After the governments have agreed to implement a solution to a specific boundary waters problem, the IJC — when requested by the two governments — assumes responsibility for monitoring, surveillance and coordination of the implementation. The object is to ensure compliance with the agreement by all parties associated with the issue, be they individuals, firms, or state, local or provincial governemnts; evidence of noncompliance is reported to both national governments.

The IJC has yet to exercise its fourth responsibility because the two governments have yet to authorize it as provided by Article X of the treaty. Were Canada and the U.S. ever unable to come to terms on a given boundary waters issue, an appropriate bilateral reference would empower the IJC to adjudicate the matter after prior advice and consent from the U.S. Senate and the Canadian Governor General in Council.

It was noted earlier that Representative Max Baucus, after his return from discussions with Rio Algom in Toronto, urged the State Department to refer the Cabin Creek issue to the IJC. A number of Western Montana citizens' groups echoed Baucus' call throughout the following year, perhaps with the uninformed judgment that the IJC had power to "solve" the Cabin Creek problem authoritatively and without delay. The State Department's public image suffered somewhat for its resisting pleas for an IJC reference, but subsequent conversation between State's Canadian desk and Baucus' staff revealed the reasons for the resistance. First, the State Department believed (right or wrong) that the Cabin Creek issue had not yet developed sufficiently to provide U.S. and Canadian negotiators the kind of specific questions required for an IJC reference; Rio Algom, after all, had not even applied for production licensing; preliminary mining and marketing studies had not yet been completed; no one had yet conducted an environmental impact assessment. Moreover, the State Department had only recently experienced a disastrous deadlock with the Canadians over North Dakota's Garrison Diversion Project, a matter referred to the IJC in desperation. Several American observers believe that the State Department's reluctance to seek another reference stemmed from a wish to prove that diplomatic consultations outside the IJC can still solve transboundary controversies, and that the IJC should not become a "dumping ground" for hot issues.

Secondly, there was no guaranty that the IJC could accomplish more than the current efforts. The professionals at the State Department were aware of the issues under discussion in diplomatic circles concerning the shortcomings and limited capabilities of the IJC, especially with respect to the rather lean financial resources afforded the Commission by the two governments. Recent history has demonstrated that the IJC is only as good as the political good will of the current Canadian and American policy makers. No example illustrates this more clearly than the performance of the Great Lakes Water Quality Agreement signed by President Nixon and Prime Minister Trudeau in 1972.

The agreement resulted from an intensive IJC study of Great Lakes pollution initiated by a reference from both governments in 1964. In order to meet the objectives of the agreement by the December 31, 1975, deadline Congress amended the Federal Water Pollution Control Act of 1965, which contained a general program of grants to the states for construction of sewage and water treatment facilities. Through amendments to the Act (in 1970 and 1972),

Congress increased the federal share of funding to as much as seventy-five percent for priority projects; for the three-year period including 1975, Congress appropriated $18 billion to implement the Act.

Though he had co-signed the Great Lakes Water Quality Agreement with Prime Minister Trudeau, President Nixon vetoed the Federal Water Pollution Control Act Amendments of 1972, which Congress enacted to implement the agreement (in addition to meeting other objectives). Congress, in turn, overrode Nixon's veto, but the President then proceeded to impound $9 billion, half the appropriated amount earmarked for grants to the states under the Act. This lack of political "good will" delayed efforts to meet the deadline set forth in the agreement. Despite numerous examples of the IJC's successes, the record of the Great Lakes Water Quality Agreement is evidence of an inherent vulnerability within the system to lack of political good will on the part of one or both governments.

III

The importance of provincial good will to transboundary water issues becomes more clear in light of the overall provincial prerogatives in Canadian foreign policy. Uninitiated American observers might recoil against the reality that provinces *do* in fact conduct international affairs, often separate and apart from any Dominion guidance or control. Although American states exercise various prerogatives in foreign issues, primarily in matters involving international trade agreements, such transactions occur within a well defined framework of federal authority. No state legislature or governor presumes authority beyond that of the president in setting foreign policy. Legislatures and governors do issue symbolic policy statements in the form of resolutions and decrees, often on such subjects as United Nations membership and human rights, but American federalism assigns no legal force and effect to such actions. The Constitution stipulates that foreign policy will be solely a function of the presidency with advice and consent of the Senate.

This is not to say that Canadian federalism disallows a unified national foreign policy. It does not. The following examples, however, illustrate a degree of provincial autonomy in foreign affairs not duplicated in the American experience, and hopefully serve to place in perspective the provincial role with respect to transboundary water issues.

In the winter of 1976, the world community experienced tremors of apprehension over events in southern Africa. The issue of black majority rule in white-ruled African states exploded with a fury that not even the most well informed observers had foretold. Extensive news coverage, replete with photographic footage of atrocities, assailed liberal democratic sensibilities throughout the Western world. So incensed was the government of Saskatchewan over the adamancy of South Africa's white regime against granting full political and civil rights to the black majority, that it enacted a boycott of South African Wines, a substantial import commodity. Such a boycott is unquestionably an act of foreign policy.

A more dramatic act of provincial foreign policy occurred on January 28, 1976, when Saskatchewan enacted a bill to "nationalize" its resident potash industry. Since the mid-1960s, the American companies which control the industry have endured progressively heavier taxation by the province, and have resisted provincial pressures to increase potash production in the face of accelerating demand in the U.S. agricultural market. The provincial government naturally desires higher production in order to increase its share of revenues and economic stimulus from potash sales, but the companies fear depressed prices and lower profits resulting from increased supply. Having periodically threatened nationalization, the provincial government finally offered legislation to do just that, a development that American investors fear may irreparably damage U.S.-Canadian commercial relations. Delegates to the 1976 meeting of the Canada-U.S. Interparliamentary Group debated the issue at length and focussed much attention on the question of whether Canada's federal government should "disallow" the provincial government's action in the interest of preserving a critical feature of mutual relations. At length the Group reached the conclusion that a Dominion veto of provincial action is "more theoretical then fact," and that nationalization of the potash industry is "clearly a matter within the Provincial jurisdiction — which is closely guarded . . ."

The foregoing examples render a general perception of provincial prerogatives in U.S.-Canadian relations and illustrate the "confederal" relationship between the provinces and the Dominion. More akin to the Cabin Creek issue is the controversy surrounding the planned construction of a 1,200-million watt coal-fired electric power complex in southern Saskatchewan. The provincially owned Saskatchewan Power Corporation (SPC) has laid plans to dam the East Fork of the Poplar River in order to provide cooling water for the complex. The river, unfortunately, flows across the international boundary into Montana.

Following the announcement of SPC's plans on September 11, 1974, the U.S. State Department received protests from Montanans who feared damage not only from SPC's appropriation of water, but also from imminent pollution. Subsequent consultations between the federal governments, Montana and Saskatchewan resulted in formation of a joint U.S.-Canadian task force charged with the responsibility of apportioning the Poplar's waters equitably. Attendant issues relating to potential pollution fell to the IJC in the course of its final evaluation of the task force's apportionment. Though Saskatchewan had endorsed formation of the task force, had agreed to participate in its operation, and had expressed a willingness to pursue a resolution of the conflict through traditional mechanisms, the provincial government authorized SPC in the spring of 1976 to appropriate a considerable volume of the spring runoff to fill a power plant reservoir situated two miles north of the border. The action came *after* the task force's announced intention to recommend to the IJC a 50-50 apportionment of the Poplar's waters, and *before* a public hearing could be held in accordance with customary procedure.

The result of Saskatchewan's apparently cavalier treatment of the affair has been suspicion and uncertainty, particularly on the part of Montanans, over the efficacy of existing arrangements for dealing with transboundary water issues. Ensuing negotiations concerning a formal bilateral reference to the IJC have deadlocked over wording and

content. Whispered allegations of "deals" between the State Department and Canada abound. The following excerpt from an Environmental Quality Council staff report bears witness to the public's misgivings as a result of Saskatchewan's response to the Poplar River contrversy:

> The treaty mechanism's emphasis on secrecy, its distance from the problems and people affected, and its inherent limitation of considering problems piecemeal and in isolation from the desires of affected citizens may mean the 1909 treaty is in need of overhaul, replacement or revision.

Subjective judgments as to who is at fault in the Poplar River controversy must be withheld until the facts are in, and should not venture beyond statements of what has been perceived by one side or the other. Unfortunately, perceptions—not necessarily factual knowledge—often bear heavily on the success or failure of international consultations. Though Montanans now perceive Saskatchewan negatively because of the Poplar River developments, one should not assume that Saskatchewan is a maverick that rides roughshod over international agreements. The province has, in fact, a highly developed political system and is considerably more experienced in international affairs than the state of Montana.

The lessons of the preceding examples are nonetheless clear: provinces conduct foreign affairs, often independent of the Dominion; provinces, even when entering into international consultations to which the Dominion is a party, exercise remarkable autonomy (witness Saskatchewan's decision to apportion Poplar River water contrary to previous agreements with Montana, the State *Department and the Dominion*); successful operation of existing institutions for dealing with transboundary water problems requires provincial good will on he parts of the respective federal governments.

IV

The staggeringly vast expanses of Canada's "prairie provinces" roll steadily westward toward the majestic Canadian Rockies, away from the more densely populated "main stream" of Ontario and Quebec, the heartland of Canada. Even further west, beyond the prairies and the physical barrier of mountains, lies British Columbia, forested, rich in minerals, and apart.

Insulated as it has been from the rest of Canada, British Columbia has reached outward from its Pacific shores to establish close and profitable relationships with merchants and markets throughout the world, and has built cities that are as beautiful as any on earth. That British Columbia looked first to the Pacific and not to its sister provinces for access to the outer world is understandable in more than geographical terms: the vast majority of its settlers came on ships and not on wagons or railroads. Many hailed from non-Canadian lands in the British Commonwealth. Many others were former Americans, fortune-seekers who found no gold in California's Gold Rush of 1849 but who were hearty enough to try it again in British Columbia's Rush of 1859. This, perhaps more than anything else, explains the traditionally close associations between British Columbia and the American Pacific states, particularly California.

Since relatively few of the British stock pioneers came from other Canadian provinces, British Columbians have virtually no tradition of bitterness against the United States engendered by the American War for Independence. So strong, in fact, have been American-British Columbian ties, that a serious popular movement for American annexation emerged periodically in the latter 1800s. This distinctly un-Canadian experience has, however, completely run its course and bears not at all on modern provincial politics and attitudes.

British Columbia is no stranger to the arena of transboundary water affairs, a fact dramatically illustrated by its role in the implementation of the Columbia River Treaty. The province also participated actively in the lengthy discussions which led to the treaty's provisions, i.e., a plan for "cooperative development of the water resources of the Columbia River basin." Following trilateral proclamation of the treaty by President Lyndon Johnson, Prime Minister Lester Pearson and Premier William Bennett of British Columbia on September 16, 1964, the provincially owned British Columbia Hydro and Power Authority became the prime Canadian entity for the implementation of a massive project involving construction of hydroelectric generating facilities, transboundary flood control, and apportionment of waters. The Permanent Engineering Board of the Columbia River Treaty concluded in its Annual Report to the governments of the United States and Canada for 1976 that the work prescribed by the sixty-year agreement is on schedule.

While the success of the Columbia River Treaty thus far suggests that British Columbia is capable of masterful negotiation and steady good will, a more recent affair testifies to the institutional weaknesses examined earlier. In 1942, the International Joint Commission granted permission under Article IV of the Boundary Waters Treaty to the Seattle City Light Company to raise the height of Ross Dam, a hydro-electric generating facility on the Skagit River, thirty miles south of the British Columbia boundary. The additional height is needed, says the company, to raise the level of the reservoir and thus increase generating capacity for electricity-hungry Seattle. Because the plan would inundate 5,180 acres stretching eight miles into British Columbia, the IJC's approval was contingent upon an agreement between the province and the city of Seattle as to appropriate compensation for the lost acreage. After *twenty-five years* of sporadic negotiation, Seattle and British Columbia came to terms—Seattle would "rent" the inundated land for ninety-nine years at an annual charge of $34,566.21.

The story, unfortunately, does not end there. Shortly after Seattle forwarded its first payment to Victoria, the provincial government responded to growing public indignation over the loss of land which is clearly a "unique and irreplaceable natural asset." The parties to the rental agreement went back to the conference table to spend an additional three years before reaching a deadlock. In 1970, Seattle applied to the Federal Power Commission for permission to commence work on Ross Dam as authorized by the IJC, while British Columbia sought reversal of the IJC's original approval. Additional negotiations yielded no resolution, but the IJC did agree to conduct an environmental and ecological study to determine the effects

of the plan. While the Commission studied, the FPC deliberated on Seattle's application but has yet to reach a decision.

In 1974, the government of British Columbia refunded Seattle's rental payment and formally asked the IJC to nullify its 1942 approval of Seattle City Light Company's application. While the Commission has chosen not to act on the request for the time being, it has formed a Canadian environmental advisory group to reexamine the results of its initial environmental study. Seattle City Light, in the meantime, has invested more than five million dollars in a project it considers certain to be licensed by the Federal Power Commission, thus raising the spectre of its seeking compensation from the province if efforts to halt the project are successful.

The similarities of the Skagit River and Cabin Creek issues are indeed striking, but they are hardly encouraging. British Columbians fear destruction of the Skagit Valley just as Montanans fear for the Flathead River. The governments of Montana and British Columbia both confront large, well financed firms with enormous incentive to develop the resources in the affected areas. Both must rely on the good will of foreign governmnts and the operability of international institutions in the defense of their respective interests.

The dissimilarities, however, are as important, especially from Montana's perspective. With respect to the Skagit controversy, British Columbia's back is "against the wall." The issue is far more advanced than the Cabin Creek matter inasmuch as British Columbia's satisfaction hinges on *eventual reversal* of an earlier IJC decision, an eventuality that could have severe repercussions within the framework of American-Canadian boundary affairs. Montanans must consider the question of whether Federal Power Commission licensing of the Ross Dam project would destroy the good will required for satisfactory resolution of the Cabin Creek issue since British Columbia holds the key to protecting Montana's interest. Finally, Montana holds no such key ot satisfying British Columbia with respect to the Skagit Valley; that matter rests completely with other American authorities and to some extent with the IJC.

The New Democratic Party (NDP) under David Barrett headed the government of British Columbia during the storm of controversy which led to the refunding of Seattle's rental check. While there is no positive proof that the Americans' treatment of the Skagit issue colored British Columbia's reaction to the Cabin Creek issue, subsequent developments suggest that the Barrett government was reticent on the subject of Montana's interests, quite possibly because it had its hands full in the area of transboundary water problems.

This reticence first materialized in February of 1975, less than a year after the NDP asked the International Joint Commission to reverse its 1942 Skagit decision. A senior reclamation officer of British Columbia's Department of Mines and Petroleum Resources, J. D. McDonald, turned down an invitation by Montana's Governor Tom Judge to discuss the Cabin Creek problem with the Governor and state resource officials. Representative Max Baucus' office learned later that even though McDonald had initially expressed a willingness to discuss the issue with Judge, the provincial government concluded that such a discussion would be premature in light of the "preliminary" nature of activities on Cabin Creek. The NDP government, however, certainly had sufficient experience in such matters to realize that whether "preliminary" or not, the Cabin Creek activities had generated anxiety in Montana over a perceived threat to the state's interests. *Discussion* of the perceived threat between representatives of the two governments was a reasonable prospect under the circumstances, and the provincial government's response is difficult to understand.

Until late October of 1975, there was little hope in the U.S. State Department that British Columbia's NDP government would endorse formal consultations with the United States over Cabin Creek, at least until Rio Algom applied for coal production licensing. One State Department official suggested that the NDP was "fond of pulling the Eagle's feathers," partly because of an inherently nationalistic proclivity and partly because of perceived American intransigence on the Skagit issue.

The NDP's ever more tenuous political position complicated the Cabin Creek matter as 1975 wore on. On November 26, 1975, just weeks before British Columbia's provincial elections, the Dominion accepted the State Department's October 20 proposal for consultations on Cabin Creek. Ottawa suggested that the first round of discussions be held early in 1976. On December 11, 1975, the voters of British Columbia went to the polls and delivered a resounding landslide victory to William Bennett and the Social Credit Party. The election did little, however, to clarify the future of Cabin Creek and Montana's Flathead River. On the one hand, the Social Credit Party had amply proved its capabilities and skills in cooperating with the United States on transboundary water problems. Bennett, after all, had been Premier during the Canadian ratification of the Columbia River Treaty and had exhibited none of the NDP's proclivity toward "pulling the Eagle's feathers." Officials of the U.S. State Department were privately optimistic over the probability of fruitful negotiations with the Bennett government on Cabin Creek.

On the other hand, the Social Credit Party had made an issue of the NDP's failure to promote new mining. Montanans wondered if the Bennett government would initiate a "crash" program to maximize coal production at the expense of the Flathead River. State Department officers wondered if political realities would severely constrain the Social Credit Party's perception of British Columbia's responsibilities under the Boundary Waters Treaty. Clearly, the provincial election portended change with respect to Cabin Creek, but few Americans could venture predictions on the *kind* of change.

In preparing for the Cabin Creek talks, the State Department formed an interagency task force comprised of five agencies within the Department of the Interior, the U.S. Forest Service and the Environmental Protection Agency. The key Interior Department agencies were the Bureau of Mines, the Bureau of Land Management and the U.S. Geological Survey. The task force drafted papers on a range of technical questions that included the potential transboundary pollution threat from planned mining activities on Cabin Creek and the need for expanded cooperation with the Canadians in preserving the Flathead region. The task force sought to supply to American negotiators the scientific and technological background required for realistic evaluation of anticipated Canadian positions during the forthcoming consultations. The State Department knew from experience that transboundary water issues often center on esoteric scientific questions, and

that workable answers to such questions necessitate close support from the scientific community.

The government of Montana also made preparations. Bill Christiansen, then Lieutenant Governor, held the office charged with responsibility for dealing with the Cabin Creek issue. He and his staff collected scientific data on the current base line quality of the Flathead drainage, and met periodically with the federal task force to develop positions and strategies. Christiansen's office had considerable previous experience in such matters, notably in the Poplar River controversy discussed earlier.

A major source of American apprehension was the nature of British Columbia's laws governing pollution control and reclamation by coal mine operators. The province's Coal Mines Regulation Act lacks clearly defined standards for denial of coal mining licenses, a fact that troubled Montanans who are accustomed to the kind of specificity found in Montana's Strip Mining and Reclamation Act. The "comprehensive procedure for minimizing environmental damage" is tenuously rooted in statute, by American standards, inasmuch as the Coal Mines Regulation Act requires only that mine operators "maintain a reclamation program" and that they leave the land and water courses in a condition satisfactory" to British Columbia's Minister of Mines and Petroleum Resources.

By contrast, the Montana act provides for disapproval of licensing applications when "the overburden on any part of the . . . land described in the application" cannot be disposed of without "substantial deposition of sediment in the streambeds, landslides, or water pollution. . . ." Moreover, the Montana statute provides remedies for individuals who are damaged as a result of water pollution from coal mining operations: "An owner of . . . real property who obtains all or part of his supply of water . . . from an underground source . . . may sue an operator to recover damages for contamination, diminution, or interruption of the water supply. . . ."

The real effect of British Columbia's mining laws is not readily apparent in the language of the actual statutes. The licensing process itself is a better indicator since it reveals a highly developed procedure which involves scrutiny of licensing applications by professionals within several provincial bureaucracies. Leaving the land "in a condition satisfactory to the Minister" involves preparation of lengthy production and reclamation programs by the operators and approval of these programs by (1) the Minister of Lands, Forests, and Water Resources, (2) the Minister of Recreation and Conservation, and (3) the Minister of Agriculture. The professional staffs of the conulting ministries evaluate the proposed programs and submit to the respective executives their recommendations for enforcement not only of the Coal Mines Regulation Act, but also of the Water Pollution Control Act, the Environmental Land Use Act and others. While the lack of specific statutory language implies a high degree of discretion on the part of the Minister of Mines and Petroleum Resources, the actual licensing procedure reveals that the government of British Columbia takes the law very seriously. Less distinct are the parameters of ministerial discretion in light of public opinion on a given mining issue and—equally *important—the nonstandard* nature of the law. Implied is the possibility that satisfying the minister with respect to one licensing application may not be the same as satisfying him with respect to another.

With these and other questions in mind, negotiators representing the State Department and the government of Montana sat down to a table with representatives of British Columbia and the Dominion on March 9, 1976, in Ottawa. To the relief of many Montanans, the provincial negotiators receded from the previous "vague assurances" rendered by the Barrett government, and offered instead to discuss specific ways to ensure the protection of Montana's interests on the Flathead River. As Professor Hans Peterson of Northern Montana College notes, the Canadians offered to provide "detailed environmental impact studies" relating to the Cabin Creek operation "as these become available," and to obtain input both from Montana and the State Department of the effectiveness of provincial licensing requirements in protecting the Boundary Waters Treaty. Further consultations, they agreed, could be held in the event that Montana discovered dangers in the provincial licensing plans.

In accordance with the agreement, British Columbia subsequently furnished to American authorities a comprehensive three-stage licensing plan. Stage I provides for a detailed "preliminary assessment" by Rio Algom (for review and possible modification by the province) of the full range of its anticipated activities on Cabin Creek. Included is analysis of existing data for the purpose of identifying "data gaps" which must be filled to ensure effective enforcement of the law.

Following the review and acceptance of Stage I, Rio Algom will prepare a more detailed development program that includes site specific impact statements as the operation bears on water, aquatic and air resources—Stage II. The province will then review this program with special attention to suggested alternative ways of managing and minimizing the impacts.

Stage III is the final preparation of operational plans in accordance with the province's evaluations and stipulations pursuant to the previous stage. Following Rio Algom's applications for the necessary licenses, the government will prepare programs and systems to monitor the construction and operation of the Cabin Creek mine. Cabinet approval or denial of the licensing applications is the culmination of Stage III.

The critical feature of the system is Montana's access to the mountain of studies, reports and evaluations attendant to the licensing process. While the Ottawa agreement guaranteed this access, the burden of recognizing and acting on potential threats to its own Flathead interests rests squarely on Montana's shoulders. Whether the government of Montana possesses the wherewithal and resolve to guard diligently against degradation of the Flathead River is a matter that must be left to others to pursue. Despite its enormous resources and its demonstrated resolve, the State Department faces myriad controversies and issues relating to U.S.-Canadian relations and cannot be expected to act energetically on the Cabin Creek issue if Montana is not "willing to carry its own ball."

The licensing process is underway. British Columbia's Minister of the Environment, James A. Nielsen, reported to Max Baucus on October 22, 1976, that Rio Algom had submitted a Stage I report and that the various provincial agencies had completed their respective reviews. Still uncertain, however, is whether the Sage Creek Project is economically feasible from Rio Algom's perspective, at least over the short term. Nielsen's letter to Baucus mentioned

that Rio Algom has contemplated "a smaller scale development" at Cabin Creek, ostensibly because of fluctuating marketing conditions abroad.

Whether Montana confronts the reality of Cabin Creek coal mining as an immediate or distant development, the reality itself remains. Given the existence of the Crowsnest Field and its geographical proximity to transboundary water flow, and given the fact of an energy-hungry world that turns its eyes more and more to coal, a clear need emerges to modify the institutions for dealing with Cabin Creek-type issues. A number of considerations lead to this conclusion.

First, there is no guarantee that Canada's Department of External Affairs and America's State Department, the functional entities of the Boundary Water Treaty, can adequately represent the interests of Canadian provinces and American states in transboundary water issues. This is woefully apparent in the handling of the Poplar River and Skagit Valley issues. In the Poplar River affair, the Department of External Affairs appears unable to restrain Saskatchewan from acting unilaterally despite agreements to do otherwise with Montana and the State Department. In the Skagit Valley affair, the State Department appears unable to influence the decision on whether to permit the raising of Ross Dam while the Department of External Affairs is similarly unable to protect the interests of British Columbia. The very proliferation of border controversies—concerning transboundary water and air, television broadcasting and a host of others—limits the time and energies the State Department can devote to any single issue. States like Montana are consequently forced into the unfamiliar arena of international relations when confronted with a problem like the Poplar River or Cabin Creek issues.

Second, existing institutions do not account adequately for Canadian federalism. The major written component of Canada's constitution, the British North America Act, engendered a clear principle of "Divided Sovereignty," and allocated to the provinces the power to deal with all matters relating to property. Provinces have nearly exclusive jurisdiction in disposition of natural resources on publicly owned lands.

In view of Canadian federalism, the Boundary Waters Treaty should have been signed by the United States and each of the provinces. "Injury to health and property" are provincial concerns. Seldom if ever does the Dominion interfere in those concerns. The need, then, is for a new framework of American-Canadian relations that promotes a maximum degree of closeness and cooperation between the provinces and the various echelons of American government.

Could such a "new framework" be formalized by written agreement? There is little reason to think not. A compact signed by the governments of the United States, Montana and British Columbia—aimed specifically at coordinated multilateral examination of transboundary water issues and cooperative efforts to deal with them—should be a realistic goal. An important feature of any new mechanism is public education as to the stakes such issues involve. The signatories would thus be able to gauge each others' political constraints through input from interest groups and associations, and would be better able to exercise the "art of the possible" in formulating proposals and goals. Such a compact could serve as a blueprint for other states and other provinces to follow in seeking solutions to their respective controversies.

British Columbia's display of good faith in the Ottawa Cabin Creek agreement does not end the issue. Mentioned earlier was the question of whether Montana can take advantage of the province's willingness to share the evaluation of licensing applications. Although this is a major concern, more fundamental questions arise. Can the application of high technology suggested by the three-stage licensing procedure render *any* kind of coal mine on Cabin Creek harmless to the Flathead Valley? What would happen if Montana and the State Department objected to a given licensing requirement and subsequent negotiations yielded no satisfactory compromise? Would British Columbia accede to American urgings to deny approval of the applications, thus foregoing the revenue and economic stimulus of renewed mining? These are questions that may not be properly addressed within the confines of present arrangements.

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